IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19-9-2007

Coram

The Honourable Mr.Justice S.J.MUKHOPADHAYA
and
The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

W.A.No.668 of 2007
M.P.No.2 of 2007

1. The Joint Commissioner of Police,
Traffic Zone, Vepery, Chennai - 7.

2. The Deputy Commissioner of Police,
Traffic (North), Vepery,
Chennai - 7. ... Appellants

Vs.

G. Anandan, PC 12163 ... Respondent

This Writ Appeal has been filed under Clause 15 of Letters Patent against the order of the learned single Judge in W.P.No.27930 of 2006 dated 4.1.2007 to issue a Writ of Certiorarified Mandamus or any other writ, order or direction in the form of writ to call for the records inconnected with the proceedings issued in C.No.15/PR/SRP/99 TZO.No.266/06 C.No.158/9036 - A/TR.PR (N)/06 dated 20.07.2006 and Tha.Pa.No.15/99 Rule 3 (Aa) passed by the 2nd respondent and C.No.5/AP/TR.PR(N)/2006 dated 12.08.2006 passed by the Ist respondent and quash the same and consequently direct the respondent to reinstate the petitioner into service with all benefits.

For Appellants : Mr.D.Srinivasan,
Addl. Government Pleader
For Respondent : Mr.S.Ilamvaluthi

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J U D G M E N T

N. PAUL VASANTHAKUMAR, J.

This writ appeal is directed against the order passed by the learned single Judge in W.P.No.27630 of 2006 dated 4.1.2007, setting aside the order of dismissal from service and remitting the matter with a direction to give strict warning to the writ petitioner/respondent herein.

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2. The brief facts necessary for disposal of the writ appeal are that the writ petitioner/respondent herein was appointed as Grade-II Police Constable on 30.8.1988 and he served in Chennai City Police, Armed Reserve, SRP and Traffic Zone. While he was working in the Control room traffic on 3.11.1998 due to his ill-health, he went on leave for 60 days and he joined duty before the expiry of 60 days. A charge memo was issued in PR.No.15/99 under Rule 3(b) of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955, by the Superintendent of Police. The respondent herein submitted his explanation on 22.5.1999 and the explanation having been found not satisfactory, the Deputy Commissioner of Police, Railway Police, Central Madras, was appointed as Enquiry Officer. The Enquiry Officer found that the charge of absenting from duty from 3.11.1998 was proved and thereafter the second petitioner herein, by order dated 20.7.2006 dismissed the respondent from service. The appeal filed by the respondent before the first respondent was also dismissed on 12.8.2006. The said orders of removal from service, confirmed by the appellate authority was challenged before this Court in W.P.No.27930 of 2006 by contending that the respondent was permitted to join duty by the Superintendent of Police, before expiry of 60 days on 31.12.1998, after satisfying with the medical certificate produced by him and therefore he could not be treated as deserted from duty as per Rule 88 (1) of the Police Standing Orders and the circular issued by the Director General of Police dated 5.10.1990 states that for desertion, charge memo should not be issued under Rule 3(b) and it could be issued only under Rule 3(a) of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955. The other reason given to challenge the order is that the punishment is disproportionate to the delinquency and the appellate authority has not passed a speaking order and the same is in violation of Rule 6 of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955.

3. The appellants herein filed counter affidavit by contending that on earlier 12 occasions the respondent was adversely noticed and was dealt with PR and on 15.10.1999 for similar charge, he was dismissed from service. The appeal filed by him was also rejected on 26.11.1999 and he filed O.A.No.5357 of 2000 before the Tamil Nadu Administrative Tribunal. The Tribunal by order dated 4.4.2002 set aside the order of dismissal and ordered to reinstate the respondent herein in service relying on the above referred circular issued by the Director General of Police. Consequently the respondent herein was reinstated in service on 26.4.2002. The impugned punishment with reference to PR.No.15/99 was pending when the other proceeding was finalised and based on the latest instructions of the Director General Of Police dated 2.11.2005, the respondent was removed from service on 20.7.2006 wherein it is stated that the desertion once may be accepted and if repeated should not be accepted. It is further stated in the counter affidavit that instructions issued on 2.11.2005 superceded all the instructions issued earlier including the one issued by the Director General of Police on 30.10.1990. It is further stated in the

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counter affidavit that the contention that he was continuously doing duty is not correct as he was dismissed from service and he remained out of employment from 16.10.1999 to 26.4.2002. The appellants applied the existing instructions of the Director General of Police and dismissed the respondent from service. The punishment imposed is also proportionate as he remained absent on several occasions and he was punished previously.

4. The learned single Judge held that the application of the circular issued on 2.11.2005 to the charge memo issued in the year 1999 cannot be sustained and the respondent's case could be considered in the light of the circular issued in the year 1990. The learned single Judge also found that the punishment imposed is unproportionate and ultimately set aside the order of punishment and remitted the matter to impose strict warning to the respondent.

5. The learned Additional Government Pleader appearing for the appellants contended that framing charge against the respondent for desertion is in accordance with PSO 95(1) and Tamil Nadu Police Subordinate Service (Discipline & Appeal) Rules, 1955, and the learned single Judge was not right in issuing positive direction to impose severe warning.

6. The learned counsel appearing for the respondent submitted that the respondent having been permitted to join in service on the 59th day, and the charge being absence from duty, the extreme penalty of removal from service is highly disproportionate. Learned counsel also submitted that the appeal filed by the respondent before the first respondent is not disposed of in accordance with Rule 6 of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955, as it is a non-speaking order and therefore the learned single Judge is justified in allowing the writ petition and reducing the punishment.

7. We have considered the rival submissions made by the learned counsel appearing for the appellants as well as respondent.

8. It is not in dispute that the respondent absented from duty from 3.11.1998 and was permitted to join duty by the Superintendent of Police on the 59th day i.e., on 31.12.1998, after accepting the medical certificate produced by the respondent. The charge against the respondent is unauthorised absence without any leave or permission and deserted the post with effect from 3.11.1998 at 13.00 hours. The past conduct of the respondent even though is mentioned in the counter affidavit, the same is not reflected in the order of dismissal. The contention of the learned counsel for the respondent that the circular issued in the year 1990 alone is applicable to deal with the charge framed in the year 1999 cannot be sustained in view of the pendency of the proceeding during issuance of the circular on 2.11.2005. The fact remains that the respondent filed appeal before the first respondent under rule 5 of the Tamil Nadu Police Subordinate Service (Discipline & Appeal) Rules, 1955. The manner in

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which the appellate authority shall dispose of the appeal is mentioned under Rule 6(1), which reads as follows:

> "6(1) In the case of an appeal against an order imposing any penalty specified in rule 2, the appellate authority shall consider-
>
> (a) whether the facts on which the order was based have been established;
>
> (b) whether the facts established afford sufficient ground for taking action; and
>
> (c) whether the penalty is excessive, adequate or inadequate; and after such consideration, shall pass orders-
>
> (i) confirming, enhancing, reducing or setting aside the penalty; or
>
> (ii) remitting the case, to the authority which imposed the penalty or to any other authority with such direction, as it may deem fit, in the circumstances of the case.
>
> ....."

9. The contention of the learned counsel for the respondent is that the appellate authority has not passed speaking order by following the above said rule. For proper appreciation, the order of the appellate authority is extracted hereunder:

> "PROCEEDINGS OF THE JOINT COMMR. OF POLICE, TRAFFIC ZONE, VEPERY, CHENNAI-7
>
> Present: Thiru Sunil Kumar, IPS.
>
> C.No.5/AP/TR.PR(N)/2006 Dated: 12.08.06
>
> Short Title: Traffic zone - Appeal petition of Ex.PC.12163 Anandan, Traffic planning against the orders of removal from service in SRP/PR.No.15/99 u/r.3(b) of the TNPSS(D&A) Rules, 1955, by DC/Traffic (North) - Orders - Issued.
>
> Read : His appeal petitiondt.24.7.06.
>
> ***
>
> ORDERS:-
>
> I have gone through the representation of the appellant, the minute and the order passed by the punishment authority.

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2) I feel the punishment awarded is not excessive and matches the delinquency committed by the delinquent. Hence, I would not like to interfere with the punishment already awarded and would allow the punishment awarded as suggested by the punishing authority.

Sd/-*********
Joint Commr.of Police,
Traffic Zone."

From the perusal of the above order we could see that the appellate authority has not disposed of the appeal in terms of Rule 6(1) extracted above. As per the said rule, the appellate authority shall give a finding while considering the appeal as to whether the facts on which the order is based have been established, among other things. No such finding is given by the appellate authority, except by stating that he has gone through the representation of the appellant, minutes and the order passed by the punishing authority. Hence we are unable to confirm the order of the appellate authority as it is not a speaking order passed in terms of section 6(1) of the Rules.

10. (a) Similar issue with regard to Rule 23 of the Tamil nadu Civil Services (Discipline and Appeal) Rules, was considered by a Division Bench of this Court in the decision reported in (1983) 2 MLJ 513 (G.Srinivasan v. The Government of Tamil Nadu, represented by the Commissioner and Secretary to Government, Revenue Department, Madras-9 and others) and in paragraph 8 the Division Bench held as follows:

"8. Coming to the second question as to whether the Board of Revenue has acted in accordance with rule 23 of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules, we feel that the Board of Revenue has not kept in mind the requisites necessary, under rule 23. The order of the Board of Revenue dismissing the appeal has been extracted above. The order does not give any reason as to why it confirmed the order of dismissal except saying that it did not see any reason to interfere with the order of the Collector. We are of the view that having regard to the language used in rule 23, the dismissal of the appeal by the Board of Revenue is not a proper disposal as contemplated by rule 23. Rule 23 provides as to what the appellate authority should do while considering the appeal filed by a delinquent officer against the penalty imposed on him. Rule 23(1) gives a mandate to the appellate authority to consider: (a) whether the facts on which the order was passed have been established; (b) whether the facts established afford sufficient ground for taking action; and (c)

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whether the penalty is excessive, adequate or inadequate. Thus it is clear from the perusal of rule 23 that the appellate authority is enjoined to consider whether the facts on which the order of dismissal was passed had been established and the facts established afford sufficient grounds for taking action and whether the penalty is excessive or adequate. Rule 23 directs the appellate authority to consider certain matters before passing the appellate order. The order of the appellate authority must therefore ex facie show that the matters referred to in rule 23 have been considered by the appellate authority before it passed its order. In this case, the order of the appellate authority merely says that it sees no reason to interfere with the order of the Collector and it does not indicate that it took all the matters referred to in rule 23 into consideration before rejecting the appeal. Obviously, the appellate authority the Board of Revenue in this case, appears to have overlooked the criteria referred to in rule 23, as otherwise, it would have at least referred to the relevant matters contained in rule 23 in its order. Dealing with this ground of attack, Mohan, J., has stated that according to the recent trend of opinon, if the appellate authority confirms the order in appeal, the appellate authority need not give reasons. It may be that in a case where there is no statutory provision dealing with the exercise of power by the appellate authority we have to fall back to the general principle as to whether the appellate authority is found to give reasons for his affirmation of the order of dismissal; but where the power of the appellate authority is circumscribed by a statutory provision such as rule 23 as in this case, the appellate authority should act within the confines of that rule and he cannot pass an order arbitrarily without considering the matters referred to in rule 23. We are therefore of the view that the order of the Board of Revenue, dated 4th September, 1976, stands vitiated for violation of Rule 23. On this ground, the order of the Board of Revenue which confirms the orders of dismissal passed against the appellant will stand quashed and the Board of Revenue has to pass a fresh order on the appeal filed by the appellant which should be treated as pending."

(b) The Supreme Court in the decision reported in AIR 1986 SC 1040 = (1986) 2 SCC 651 (R.P.Bhat v. Union of India) considered similar provision i.e, Rule 27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. In paragraphs 3 to 5 the Supreme Court held thus:

"3. Having heard the parties, we are satisfied

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that in disposing of the appeal the Director General has not applied his mind to the requirements of Rule 27 (2) of the Rules, the relevant provisions of which read as follows:

> "27. (2) In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said Rules, the appellate authority shall consider:
>
> (a) whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;
> (b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and
> (c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe;
>
> and pass orders—
>
> (i) confirming, enhancing, reducing, or setting aside the penalty; or
> (ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case."

4. The word "consider" in Rule 27(2) implies "due application of mind". It is clear upon the terms of Rule 27(2) that the Appellate Authority is required to consider (1) whether the procedure laid down in the Rules has been complied with; and if not, whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice; (2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequat e; and thereafter pass orders confirming, enhancing etc. the penalty, or may remit back the case to the authority which imposed the same. Rule 27(2) casts a duty on the Appellate Authority to consider the relevant factors set forth in clauses (a), (b) and (c) thereof.

5. There is no indication in the impugned order that the Director General was satisfied as to whether the procedure laid down in the Rules had been complied

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with; and if not, whether such non-compliance had resulted in violation of any of the provisions of the Constitution or in failure of justice. We regret to find that the Director General has also not given any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. It seems that he only applied his mind to the requirement of clause (c) of Rule 27(2) viz. whether the penalty imposed was adequate or justified in the facts and circumstances of the present case. There being non-compliance with the requirements of Rule 27(2) of the Rules, the impugned order passed by the Director General is liable to be set aside."

The above decision was followed by the Supreme Court in its latter judgment reported in (2006) 4 SCC 713 Narinder Mohan Arya v. United India Insurance Company Limited & Others).

(c) Another Division Bench of this Court in 2004 (3) LW 32 (M.Nagarajan & Others v. The Registrar, High Court, Madras-600 104 and another) following the above referred decision in AIR 1986 SC 1040 (cited supra), set aside the order of the appellate authority for non-compliance of Rule 23 of the Tamil Nadu Civil Services (Discipline and Appeal) Rules, and remitted the matter back to the appellate authority to pass fresh orders by following the said rules.

11. In the light of the above decisions and having regard to Rule 6 (1) of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955, quoted above to be followed in this case by the appellate authority, the order of the appellate authority cannot be sustained. Yet another factor in this case is Chapter X (88)(1) of the Police Standing order, which reads as follows,

"Police Standing Order - Chapter X (88)(1) Provides: Absence without leave for 21 days completes the offence of desertion, after which the officers' name shall invariably be struck off from the date of absence.

(2) provides: An application for reinstatement from an officer who has been struck off as a deserter shall not be entertained, unless it reaches the Superintendent or an officer of equal rank under whom the subordinate officer was serving, within two months or the date of the commencement of the absence without leave. The Superintendent of Police, if he satisfies after such an enquiry as may be necessary, shall reinstate him in service."

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12. It is also the fact that on the 59th day the respondent appeared before the Superintendent of Police with medical certificate and he was permitted to join duty. We are not expressing any opinion about the said factual aspect in this appeal and we leave it open to the appellate authority to consider the same while passing fresh orders in the appeal.

13. In the result, we set aside the order of the appellate authority dated 12.8.2006 and remit the matter to the first appellant herein to pass fresh orders following Rule 6(1) of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955, within a period of four weeks from the date of receipt of copy of this order. The order of the learned single Judge is set aside.

The writ appeal is disposed of with the above directions. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

vr

To

1. The Joint Commissioner of Police,
   Traffic Zone, Vepery,
   Chennai - 7.

2. The Deputy Commissioner of Police,
   Traffic (North), Vepery,
   Chennai - 7.

1 cc To Mr.S.Ilamvaludhi, Advocate, SR.58341.
1 cc To The Government Pleader, SR.58453.

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